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# Operating International Law in a Global Context: Taking Circulation Seriously

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***Abstract:*** The operation of the international law (*lato sensu*), in the variety of global legal situations, has its own dynamism. It cannot result from the mere application of a method or a legal solution at a given moment, in a predetermined space and on a predetermined level, by a duly identified actor. It must be grasped in one movement. In a single situation, several laws must sometimes be mobilised, alternatively, cumulatively, at the same time or at different moments, in one or several spaces or on one or several levels, by one or by multiple actors. This distinctive dynamic, which the lawyer must be conscious of when passing from one context – national, international or European – to another, has an influence over the law, its uses and, sometimes, its content. The present article proposes to focus the analysis on the idea of circulation as a phenomenon and a constraint.

***Keywords:*** Operation of the Law – Global context – Circulation – Constraint

## INTRODUCTION

"Circulation" is at term that is not commonly used by lawyers. It does not necessarily feature in specialist dictionaries[1]. However circulation is a useful tools for lawyers as it adequately describes a broad range of phenomena familiar to the lawyer and that have one common feature: they require to approach a situation in a different legal space to that in which it originated. Sometimes, the effect produced after the displacement from one normative space to another remains identical, i.e., circulation gives birth in two distinct environments to a given legal effect in the exact same manner —in the broad sense: mandatory effect, opposable effect or even factual effect. But the observed effect is often different. In other words, circulation is then transformative.

For purpose of clarity, we consider that a "circulation" phenomenon is at play every time a legal effect that arose in one legal environment appears again in a legal environment other than that in

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[1] The expression is, for example, absent from the A.-J. Arnaud (ed.), *Dictionnaire de la globalisation* (LGDJ, Paris, 2010) and although the term "circulation" features in G. Cornu (ed.), *Vocabulaire juridique* (PUF, Paris, 8th edn., 2007), the definitions given do not cover the one we refer to here. Other terms are preferred, including "exchanges", "cross-influences" or "cross-fertilisation", see on this theme, S. Robin-Olivier and D. Fasquelle (eds.), *Les échanges entre les droits, l'expérience communautaire: une lecture des phénomènes de régionalisation et de mondialisation du droit* (Bruylant, Bruxelles, 2008).

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which it originated. If the effects produced are entirely foreign to one another, or are similar purely by chance[2], it is not useful to speak of circulation.

Mere observation evidences that the phenomenon of circulation does not generally follow an organised process. It has an eminently factual dimension in which a person, an object, a legal instrument, a judgment or a tort moves from one normative space into another and in which the question arises whether the approach taken to the situation in the receiving space stems from the legal solutions applied in another normative space, notably the place of origin. For example, a ship — whether public or private— flying the flag of a given country and carrying on board its crew and goods, sails from port to port, in territorial waters, in regional zones and on the high seas. This practical situation of circulation interests the law for two reasons. Does the legal status of the ship, that of its crew and of the goods it carries move from one place to another, or does it change completely depending on the successive legal environments it travels through? In the first case, it may be useful to speak of circulation to show that the situation retains the same legal effects, but not in the second, in which the situation changes according to movement from one space to another. The two solutions coexist. All depends on the nature of the question posed. For example, the ship must retain its flag and the rules that attach to it wherever it is found. Conversely, the legal status of the merchandise it is carrying may change (legal here, illegal there) according to the legal environment in which it is found.

Sometimes, circulation is regulated or encouraged by the rule of law. Thus international or regional rules (notably European) may aim to regulate this circulation by establishing a right of free movement (or a right to mobility). For example, a rule may dictate that merchandise from country A may move within country B so long as it is legal in its country of origin or that a judicial decision delivered in country A produces a legal effect in country B without the need for a formal procedure. From another perspective, circulation is written into the very procedure for accessing supranational courts, which is dominated by the rule of the prior exercise or exhaustion of domestic legal remedies. Thus the same legal situation may be handled in turn by judges situated in different contexts.

The circulation phenomenon is not unknown from judges. Expression describing it such as "legal framework of reference", or its derivatives "framework of reference" and, more modestly, "legal framework", are used quite often in European law. The European Court of Justice and, to a lesser extent, the European Court of Human Rights use the term to refer to the legal context – European or national or international – in which the legal question before them is situated. The Court of Justice of the European Union refers almost systematically to the "legal framework" and, more rarely, the "framework of reference" or "reference framework"[3] which forms a sort of prelude to its legal analysis. This practice is common in decisions delivered in the context of preliminary references. In this

[2] For a critique of the random character of the overlapping of legal orders in certain situations: P. Brunet, "L'articulation des normes – Analyse critique du pluralisme ordonné", in J.-B. Auby (ed.), *L'influence du droit européen sur les catégories du droit public* (Dalloz, Paris, 2010) 195, spec. pp. 200 *et seq.* Here we will be careful to distinguish the scenarios of the circulation of legal situations that we refer to in this chapter under the heading of the combination of laws from the more general scenarios of the circulation of legal methods and solutions that participate in a process of the comparison of laws.

[3] For an example: Case C-371/08, Ziebell, judgment of 8 Dec. 2011, not yet published.

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manner, the laws that potentially apply are listed in the beginning of the decision, whether they are from a national, international or European source[4]. The European Court of Human Rights adopts a similar practice, if only to specify the national, international and European regulatory context in which the alleged violation of the European Convention for the protection of human rights and fundamental liberties took place. The expression "framework of reference" was employed in the noteworthy judgement *Demir and Baykara v. Turquie*[5].

This practice of the two great European courts finds a certain echo in the international and national contexts. We know that the Vienna Convention of 1969 on the Law of Treaties established, under the title of a general rule of interpretation, a principle of "systemic interpretation", according to which the context of treaties must be taken into account, and in particular "any relevant rules of international law applicable in the relations between the parties"[6]. National law, for its part, may, by different means, invite the lawyer to mobilise all legal principles capable of contributing to his reasoning. For example, a national law may impose the professional obligation to undertake such a task upon a barrister or require a judge to automatically examine all the legal rules applying to a case.

International courts do not, to our knowledge, use the expression "legal framework of reference" or its derivatives. But the search for the applicable law is a natural preoccupation, which may lead an international institution to refer, in addition to the applicable international law, to a regional law, or even to a national law. For example, a judgment of the International Court of Justice[7], after having applied the International Covenant on Civil and Political Rights of 16 December 1996, referred to the African Charter on Human and Peoples' Rights of 27 June 1981 and to national constitutional provisions[8].

These practices of the European courts and, to a lesser extent, of international courts, have inspired national judges. For example, in France[9], despite the brief format of their decisions, French

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4 See, as an example, Case C-478/07, Budějovický Budvar, národní podnik, [2009] ECR, 7721 which cites, under the title of international law "the Lisbon Agreement of 31 October 1958 for the Protection of Appellations of Origin and their International Registration", under the title of community law, "Regulation (CEE) n° 2081/92 of the Council of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs" and, under the title of "national law" (sic), a bilateral treaty concluded on 11 June 1976 between the Republic of Austria and the Czechoslovak Socialist Republic on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products.

5 ECHR (2008), N° 34503/97: "the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see Saadi, cited above, § 62; Al-Adsani, cited above, § 55; and Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, § 150, ECHR 2005 VI; see also Article 31 § 3 (c) of the Vienna Convention)".

6 Article 31 3 c. of the Convention[6]; compare Article 293 of the United Nations Convention on the Law of the Sea of 1982.

7 *Ahmadou Sadio Diallo case – Republic of Guinea v. the Democratic Republic of Congo* (2010), ICJ Reports (2010) 639.

8 See also, more recently: *Jurisdictional Immunities of the State - Germany v. Italy; Greece (intervening)*, ICJ Reports (2012) 99; *Ahmadou Sadio Diallo case – Republic of Guinea v. the Democratic Republic of Congo, compensation*, ICJ Reports (2012) 324.

9 National examples set forth in the present study refer to the French context, most familiar both authors. However the circulation phenomenon exists in other jurisdictions. Examples are particularly numerous in EU jurisdictions, including in Spain, as a result of the porosity between the domestic and the European levels, which in turn touches upon the international level.

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highest courts, the Council of State (*Conseil d'Etat*) and the Court of Cassation (*Cour de cassation*), do not hesitate to multiply references to national, international and European legal sources[10].

Circulation, as we define it, captures and reflects a unique phenomenon, i.e. the need to gather all pertinent legal resources building a given legal framework of reference. It encompasses a large diversity of cases, which may be described in an orderly manner. Beyond such description of the circulation phenomenon (I), the utility of taking the circulation phenomenon seriously will be demonstrated by evidencing and setting forth the general constraint on circulation pertaining to enforceable non-applicable laws (II).

## THE CIRCULATION PHENOMENON DESCRIPTION

### (1) Circulation on One Level

The phenomenon of circulation may first be observed within each context of the application of law: national, international or European. It has an essentially concrete character. Within each national, international or European legal context, situations may be led to move from one normative space to another such that phenomena of combination may be observed.

#### (a) *Circulation at the National Level*

Within a specific vocabulary, the phenomenon of circulation is considered to describe the mobility of situations (persons, goods, contracts or torts) between national legal systems. Whether we are concerned with "conflits mobiles", questions relating to the international enforceability of judicial or

[10] See, for example, *Conseil d'État*, 11 mars 2011, Req. 324071, which successively cites the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Franco-Algerian Agreement of 27 December 1968 relating to the free movement, employment and residence of Algerians and their families, the International Convention on the Rights of the Child, signed in New York on 26 January 1990 and various French laws. The reference to the two multilateral conventions is interesting in this case: the New York convention allowed the Council of State to exercise its power of censure in the name of the interests of the child; the ECHR allowed the court to recall that infringements of the right to private and family life must satisfy the demands of proportionality. Compare, Cour de cassation, ch. soc., 16 février 2011, pourvoi n° 10-60.189 10-60.191, which begins as follows: "In view of Articles 3 and 8 of Convention no. 87 of the World Trade Organisation (WTO), Article 4 of Convention no. 98 of the WTO, Article 5 of Convention no. 135 of the WTO, Articles 11 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6 of the European Social Charter, Article 11 of the Charter of Fundamental Rights of the European Union, and L. 2122-1, L. 2122-2 and L. 2143-3 of the Labour Code" ("Vu les articles 3 et 8 de la convention n° 87 de l'Organisation internationale du travail (OIT), 4 de la convention n° 98 de l'OIT, 5 de la convention n° 135 de l'OIT, 11 et 14 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, 6 de la Charte sociale européenne, 11 de la Charte des droits fondamentaux de l'Union européenne et L. 2122-1, L. 2122-2 et L. 2143-3 du code du travail"). In this case, the decision of a lower court was censured for having seen, pell-mell, in these international and European legal texts, a reason not to apply the new French law which made trade unions capable of holding elections of employee representatives subject to a condition of representativeness. It emerges, in effect, from the decision and the annexed appeal that one of these instruments did not apply to this situation and that the others were not contradicted by the French legal provision. By citing all of these legal texts, the Court of Cassation fully assumed its power to verify the absence of a violation of the law, mixing all national, international and European laws together. For a critical analysis of the judicial practice (in social protection matters) to refer pell-mell to international and European sources, see S. Robin-Olivier, "European Legal Method from a French Perspective. The Magic of Combination: Uses and Abuses of the Globalisation of Sources by European Courts", in U. Neergaard, R. Nielsen and L. Roseberry (eds.), *European Legal Method - Paradoxes and Revitalisation* (Djøf, Conpenhagen, 2011) at 307; see also, B. Teyssié (ed.), *L'articulation des normes en droit du travail* (Economica, Paris, 2011) at 223 et seq.

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extrajudicial legal instruments or judgments delivered at the national level by a public or parapublic court or, above all, the issue of the recognition of situations, very much debated at the moment, international private law doctrine has been and very much remains heavily involved in all these subjects.

The expression "conflit mobile", attributed to Etienne Bartin by private international law specialists, refers to cases in which the lawyer ponders whether it is appropriate to take into account a change in a connecting factor following the displacement or modification of a person, a good or, potentially, a legal instrument or a judgment. Thus the question of whether a property right ought to be governed by the law relating to the previous location of the good or that relating to its present location or whether the status of a person is governed by the law relating to his or her previous domicile at a given moment (when the person was born or married for example) or the law relating to his or her current domicile (upon death, for example) is posed. The answers to these questions vary according to the aim pursued and the method of reasoning employed. Sometimes, the lawyer reasons by analogy with the principles of the application of the law in time, which govern, in principle, the immediate operation of the new law. In these different cases, it may be useful to think of the situation in terms of circulation, above all as we know that legal instruments have intervened to encourage the movement of goods and persons.

The case of the circulation of foreign judicial decisions and, to a lesser extent, of foreign public or parapublic legal instruments (for example, birth certificates or authenticated documents) is very well-recognised case of legal circulation in private international law. Whether or not this circulation requires a preliminary procedure of exequatur or of recognition, it tends, in every case, to allow a legal document or a judgment issued by a judicial or extrajudicial public authority from State A to produce a legal effect in State B. The legal circulation of judgments has increased considerably in the European context. Instruments of EU law have notably been introduced to facilitate this circulation in the civil law context by strictly limiting the cases in which a receiving State may refuse to recognise foreign decisions[11]. Circulation is also common in the international context and is spreading to extrajudicial decisions.

Another case of circulation is envisaged in the context of international private relations: that of the recognition of a factual situation constituted abroad. When the situation in question has not given rise to a foreign public legal instrument, whether judicial or extrajudicial, but arises from an essentially private legal instrument (for example, the creation of a body corporate through a private law instrument, or the conclusion of a private law instrument affecting the personal status of a natural person) the question, very much debated amongst specialists of private international law, is under which conditions is it possible for that situation to produce a legal effect in another State. Some authors are favourable to the extension of the method of recognition, which disregards the verification of, and therefore the search for, the national law which presided over the situation constituted abroad.

[11] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L351/1 ; Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ 2003 L338/1.

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Such an extension of the technique of recognition would open up new possibilities for the circulation of situations from one State to another.

### (b) *Circulation at the International Level*

Circulation also takes place on the international level, although it corresponds to different realities than those we have observed in the national context. The international level is not as fragmented as national legal systems are. It is characterised by a certain unity of the applicable law: international law. If divisions exist, these result mainly from the multiplication of actors, notably international institutions, responsible for applying international law in a given domain. The phenomenon of circulation is thus limited to exchanges between these international institutions.

As one author has observed, the fragmentation of public international law is a different phenomenon from that which may be observed on a national level, notably by private international lawyers[12]. It essentially results from the multiplication of institutions, which cooperate with each other and allow legal decisions, legal instruments and torts to circulate at the international level.

Thus for example, in the context of the Libyan civil war, we know that in February 2011 the UN Security Council referred a suspected case of on-going crimes against humanity to the Prosecutor of the International Criminal Court. In a unanimous resolution, the members of the Security Council decided to refer a continuing situation that had begun in the Libyan Arab Jamahiriya on 15 February 2011 to the Prosecutor of the International Criminal Court.[13] Thus, a legal instrument —in this case a resolution of the UN Security Council— summoned an authority of international criminal law —the Prosecutor of the International Criminal Court—, which did not recognise the State concerned at the time. In this sense, we may refer to circulation between two international institutions.

### (c) *Circulation at the European Level*

The European context also presents peculiarities in terms of circulation. Institutional fragmentation is particularly marked in this context given the presence of two large organisations (the Council of Europe and the European Union) and two European courts (the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR)). Between these two organisations, the forms of circulation are numerous. Legal decisions and instruments adopted on one side and the other circulate from one organisation to the other. Very close cooperation is at work, including at an informal level as is the case today for European courts which may be led to consider comparable situations which circulate from one normative space to another.

The Council of Europe maintains particularly close ties with the European Union. These ties are partly of an institutional nature: cooperation between these two great European organisations was formalised through the exchange of letters (1987 and 1996), so-called "European" clauses were inserted into the Council of Europe conventions so as to allow the European Union to sign them, the Brussels

[12] M. Forteau, "L'influence du choix de la juridiction sur le droit applicable aux relations internationales", in J.-S. Bergé, M. Forteau, M.-L. Niboyet, J.-M. Thouvenin (eds), *La fragmentation du droit applicable aux relations internationales – Regards croisés des internationalistes privatistes et publicistes* (Pedone, Paris, 2011), 143.

[13] SC Res. 1970 (2011) 26 February 2011.

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Commission assists the Committee of Ministers of the Council of Europe, meetings are regularly held between the management of the principle institutions of the two organisations and a permanent system for exchanging information has been established. These exchanges also have a jurisdictional dimension. In effect, the European Court of Human Rights has had the occasion to consider cases involving an EU law or a national measure applying an EU law[14], even though, for the moment, the court has refused to recognise the existence of a violation of the European Union itself or of the ECHR by all of its Member States, taken collectively.

It is possible to compare this situation with the case in which the ECHR and the CJEU successively considered the compatibility of the same national situation (in Italy) from the angle of the ECHR and then EU law, where the press office of the Court of Justice, in order to explain the absence of a response by the CJEU to one of the questions before it, clarified in a press release that "(t)hat question, which has in the meantime been considered by the European Court of Human Rights[15], has not been answered by the Court of Justice. The latter has held that, having regard to the answers given to the other questions referred, there is no longer any need to examine the case from the angle of general principles of law"[16]. Even though this press release has no legal value, it is interesting to note that in it the solution is presented in a global manner as though it was the object of two successive analyses by the ECHR and the CJEU, although the judgment of the Court of Justice does not explicitly mention this point. The circulation of the legal situation in question from one institution to the other may explain the position of the judge in Luxembourg, taking into account the previous decision of the judge in Strasbourg. This shows, at the very least, that European institutions are conscious of the fact that they may be led to consider identical or similar situations and that their legal analyses may, as the case may be, complement each other.

This form of circulation of situations from one normative space to another is sure to evolve in the future in view of the adhesion of the EU to the ECHR (Article 6.2 TEU)[17].

### (2) Inter-Level Circulation

The circulation of situations between the different contexts of application of the law encompasses a range of extremely heterogeneous scenarios. Two types of approaches can usefully complement each other: the intervention of courts on different levels or the operation of the law on several levels.

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[14] See, for example, *Dangeville v. France*, ECHR (2002), No. 36677/97; compare on the subject of the implementation of the "Dublin II" EU Regulation on matters of immigration by Member States: *M.S.S. v. Belgium and Greece*, ECHR (2011), No. 30696/09, which directly influenced the case law of the Court of Justice: joint cases C-411/10 and C-493/10, *NS*, judgement of 21 December 2011, not yet published.,.

[15] *Agrati and Others v Italy*, ECHR (2011), No. 43549/08, 6107/09 and 5087/09.

[16] Press release no. 80/11 relating to Case C-108/10, *Ivana Scattolon*, [2011] ECR 7491.

[17] For a systematic and detailed analysis of the phenomenon of circulation between the two great European courts in the specific context of institutional crises, see L. Sheeck, "The Diplomacy of European Judicial Networks in Times of Constitutional Crisis", in F. Snyder and I. Maher (eds.), *The Evolution of the European Courts: Institutional Change and Continuity – L'évolution des juridictions européennes: changements et continuité*, (Bruylant, Bruxelles, 2009, 17); see also the annual edition of "Jurisprudence européenne comparée", composed by L. Burgorgue-Larsen at the *RDP* from 2004 onwards.

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### (a) *Intervention of Courts on Different Levels*

Considered in relation to the application of the law in different contexts (national, international and European), the first and principal vector of the circulation of situations is the mode of intervention of the international and regional courts that coexist with national courts.

The circulation of situations is effectively part of the very process through which access may be gained to the majority of supranational courts, which is dominated by the rule of the prior exercise or exhaustion of domestic remedies. Thus, as one author has observed, in certain cases "the internal judge and the international judge have been known to rule upon the same complaint"[18] ("*le juge interne et le juge international sont réputés connaître de la même reclamation*"). The legal situation is successively analysed by courts located on different levels. The phenomenon of circulation may also be observed on the European level. The preliminary reference procedure of the Court of Justice of the EU and the right of appeal to the European Court of Human Rights allow, according to very different procedures, a legal situation to move from one court to another. Conversely, the phenomenon of circulation between the international and European levels is much rarer. The Court of Justice of the European Union jealously defends the principle of its exclusive competence[19], such that a Member State may not, when the application of European Union law is in question, alternatively summon the International Court of Justice or the Court of Justice of the European Union, for example. But cases may exceptionally arise in which one situation is presented successively to a national court, then to the European Court of Human Rights and, finally, to the International Court of Justice.

In order to illustrate the phenomenon of circulation between the national judge and the International Court of Justice, one may envisage the case, for example, of a State that intends to exercise diplomatic protection over one of its citizens after the exhaustion of domestic legal remedies. This diplomatic protection allows a domestic situation (for example, the recourse of the citizen to the authorities of the foreign State which has taken a measure against him) to be elevated to the status of a truly international situation (for example, an interstate dispute brought before the International Court of Justice). In a scenario of this kind, it is useful to speak of circulation, insofar as the legality of the situation may be successively disputed, notably by reference to national law, before a national court and an international court[20].

This type of circulation of situations is common in the European context in which situations of domestic law are frequently considered successively by the national judge and then by the European judge. This is the case for the great majority of situations brought before the European Court of Human Rights after domestic remedies have been exhausted. The same is also true each time a

[18] M. Forteau, "Le juge CIRDI envisagé du point de vue de son office: juge interne, juge international, ou l'un et l'autre à la fois? " in *Mélanges J.-P. Cot* (Bruylant, Bruxelles, 2009) 95, at 101..

[19] Among other illustrations, see Case C-459/03, *Commission v. Ireland* ("MOX") [2006] ECR 4635. . See more recently: Opinion 1/2009, *Compatibility of the envisaged agreement on the European and EU Patent Court with the EU Treaties* [2011] ECR 1137.

[20] For an illustration of a case taken before the International Court of Justice relating to the legality of a national measure of expulsion and dispossession: *Ahmadou Sadio Diallo case – Republic of Guinea v. the Democratic Republic of Congo* (2010), ICJ Reports (2010) 639.

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national judge makes a preliminary reference to the Court of Justice of the European Union. In these different scenarios, the application of the law is successively considered by the domestic court and then by the European court, and is sometimes referred back to the national court, as in the case of a preliminary reference to the European court or in the case of a re-examination of the situation by a domestic court when such a procedure is exceptionally in place at the national level[21]. The concept of circulation thus helps us to understand that situations may be presented successively before different judges, of national or European rank.

The possibility of circulation can have a strong influence on the work of national judges, who wish to anticipate, at their stage of deliberation, a potential future referral to a European court. It is in this manner that we may read the French "Banque Africaine de Développement" case[22]. In this case in which the jurisdictional immunity of an international organisation was disputed, we remember that the French court rejected the claim to immunity and seemingly integrated into its international public order a right of access to justice established by the European Court of Human Rights, which did not have jurisdiction over the international organisation. This solution may be criticised from the point of view of public international law theory, notably relating to the resolution of conflicts of conventions[23]. But it may potentially be explained by reference to the concept of the circulation of situations. In integrating a solution of the ECHR into its international public order, perhaps the French Court of Cassation intended to anticipate an appeal to that court against France for the non-respect, in this case, of the right of access to justice, as protected notably by the ECHR. In other words, if, formally, the application of the treaty that established the international organisation could not be blocked by the European convention, the French judges have ensured that at least their decision conforms to the provisions of the European Convention in order to prevent a potential complaint of a violation of the ECHR from coming before the Strasbourg court. This analysis, although we do not know whether or not it precisely reflects the state of mind of the judges of the Court of Cassation in this case, relies on the observation that the situation presented to the French court could later be brought before a European court. When such circulation is not likely to threaten his solution, the national judge may be indifferent to the phenomenon. There is no doubt that this is what motivated the Court of Cassation in a case concerning another international organisation, in which it decided that the right of access to justice was not threatened by the founding treaty of the organisation, such that it was not necessary to raise a conflict with international public order, and went so far as to specify that the organisation had not adhered to the ECHR[24].

The case of a national decision nullifying a European intellectual property right provides another example of circulation from the national level to the European level. The EU created the community

[21] See, in criminal matters: Article 626-1 et seq. of the French Code of Criminal Procedure relating to the "reconsideration of a criminal ruling as a result of a decision of the European Court of Human Rights".

[22] *Cour de cassation, ch. soc.*, 25 janv 2005, pourvoi n° 04-41012.

[23] See in particular, the analysis of M. Forteau, "*L'ordre public "transnational" ou "réellement international"*, JDI 2011, at 17, note 57.

[24] *Cour de cassation, soc.* 11 fév. 2009, pourvoi n° 07-44240, UNESCO.

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trademark[25] which constitutes a unique and unitary right to protection in the whole of the European Union. This trademark is granted by a European agency: the Office for Harmonization in the Internal Market located in Alicante (OHIM). A national court notably has the power to nullify a community trademark judged to be invalid[26]. A decision to nullify a trade mark taken by a national court affects the whole of the EU. It is publicised at a European level. The legal circulation of the national decision is regulated by European law to avoid the delivery of contradictory national decisions on the validity of a European intellectual property right.

A decision of the International Court of Justice offers, another illustration of the scenario in which a situation has been successively presented to a national court and then, on appeal, to the European Court of Human Rights and, finally, to the ICJ, in the context of an interstate conflict. In a case relating to the immunity from jurisdiction and execution enjoyed by Germany, on the subject of actions for compensation and recovery by the next of kin of the victims of massacres perpetrated by the German army in foreign territories during the Second World War, different proceedings were taken at the national (actions by the victims' next of kin before Italian, Greek and German Courts), European (a case taken to the ECHR by some of the victims' next of kin whose cases had been rejected by the Greek and German courts on the grounds of the immunity of the German State and which was found inadmissible[27]. Even though the situation presented before these three courts[28] was one element among several others of the dispute presented in the case before the ICJ and even though the whole of the proceedings were not considered on the three national, international and European levels, the fact is that it very much illustrates a phenomenon of circulation between the different levels of application of the law and that the actors in question, notably judges, are becoming increasingly conscious of this. This is why the International Court of Justice decided in this case for the second time in its history to refer to the case law of the ECHR[29]).

The scenario of the circulation of situations between an alternative method of resolving disputes and a state method must be considered separately. The most remarkable case is that of the relationship between international arbitration and State justice. In the international commercial context, arbitration is a form of private justice with its own particular features. It has even been suggested that it constitutes its own legal world[30]. Whether or not one adheres to this theory, the fact is that international arbitration takes place largely outside any State court. This specificity is usually justified by the needs of international commercial law or of the international law of investments which calls for

[25] Regulation (EC) no. 40/94 of the Council, 20 December 1993 on the community trade mark, replaced by Regulation (EC) no. 207/2009 of the Council of 26 February 2009, OJ 2009 L78/1.

[26] Articles 95 et seq. of Regulation no. 207/2009 cited above.

[27] *Kalogeropoulou and others v. Greece and Germany*, ECHR (2002), No. 59021/00, and international levels (a conflict between Italy, plaintiff, and Germany, defendant, with Greece intervening: Jurisdictional Immunities of the State - Germany v. Italy; Greece (intervening), ICJ Reports (2012) 99..

[28] In this case, the massacre of 10 June 1944 which took place in the village of Distomo in Greece, see § 30 to 36 of the judgment.

[29] For the first case in this sense: *Ahmadou Sadio Diallo case – Republic of Guinea v. the Democratic Republic of Congo (2010)*, cited above.

[30] An "arbitrational legal order" ("ordre juridique arbitral"), to use the expression of one author: E. Gaillard in (notably): *Aspects philosophiques du droit de l'arbitrage international* (Académie de droit international de La Haye, The Hague, 2008) at 60 et seq.

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less State intervention in economic activities in the national environment, in this context, than is traditionally the case, whether or not the State is a direct party to the operations. This international private justice is regularly confronted with State justice. Encounters between these two forms of justice are regulated by rules established notably at the national level. In the French context, the Code of Civil Procedure dedicates a whole title to the question[31]. The incorporation of sentences of international arbitration into the French legal order is strictly regulated by the Code. This incorporation operates via circulation: the arbitration sentence, exterior to the French legal order, penetrates it via an institutional means and a question may arise as to its recognition by a judge from this national legal order.

### (b) *Operation of the Law on Several Levels*

The jurisdictional and therefore institutionalised method of circulation of situations between the national, international and European contexts of operation of the law is not the only one that must be envisaged. Other, more diffuse, methods can exist. These methods have a very abstract dimension. They represent the mental process through which the lawyer may shift the examination of a case from one national, international or European level to another, without the need for an institutional vector facilitating the move from one level to the other such as those that featured in the previous range of scenarios.

This intellectual shift by the lawyer takes place, most often, through the question of how a legal method or solution conceived in one context may be operated at another level. Circulation here is synonymous with operation. It refers to the situation in which a law stipulated in one context is implemented at another level. The nature of this situation differs from the phenomena of the operation of laws within each level. In order to describe the application of the foreign law, or the relationships of application between international or European norms, the lawyer does not need to refer to the figure of circulation, apart from in the concrete cases of circulation we have identified above. To the extent that he remains enclosed within one level of the application of law, we have seen, in effect, that his legal environment does not change. It is always a question of applying a law established at one and the same level: national, international or European. The situation is different in those cases of the inter-level application of law which interest us here, where the lawyer is led to move from one legal environment to another, or to circulate from one environment to the other.

For the purposes of the presentation, we may distinguish two general types of scenario. The first involves the issues of the operation of international or European law in the national context and the second, inversely, involves the issue of the application of national law in the international or European context.

#### (*i*) First scenario

[31] (Book IV – Title II: Chapter 1: The international arbitration agreement (Articles 1507 to 1508) – Chapter II: The court and the arbitration sentence (Articles 1509 to 1513) - Chapter III: The recognition and the execution of arbitration sentences delivered abroad or in matters of international arbitration (Articles 1514 to 1517) - Chapter IV: Remedies - Section 1: Sentences delivered in France (Articles 1518 to 1524) - Section 2: Sentences delivered abroad (Article 1525) - Section 3: Common provisions for sentences delivered in France or abroad (Articles 1526 to 1527) (author's translation).

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The issue of the incorporation of international and European law into national legal orders is perfectly well-known and identified. It has been the subject of conflict between two major theories, the monist theory, which militates in favour of the immediate incorporation of international and European law into domestic law, and the dualist theory, which requires the formal adoption of a statute on the national level allowing for the application of international and European law. These two theories coexist in the legal world, including within countries belonging to the same regional legal space such as those we are familiar with in Europe (the European Union or, more modestly, the Council of Europe). The conflict between these two approaches must not be overstated, however[32].

These discussions are not irrelevant to the theme of circulation. Whatever the method of reasoning he adopts, whether monist or dualist (with their numerous variants), the lawyer cannot ignore the division between the legal systems in question: one at the international or European level, the other at the national level. In order to take this division into account, the intellectual concept of circulation is sometimes useful. International and European laws are meant to be applied by the legal systems from which they originate. They remain "foreign" laws in the national context. The hypothesis of circulation raises the question of whether the application of international and European law in the national context is dependent on its application in the international or European system. If the answer is yes, the concept of circulation is useful. If the answer is no, it is useless.

Circulation does not only take place in one direction. Although it has not been presented from this angle much before, circulation may be observed from the national level towards the international or European level. The phenomenon is particularly marked in those areas in which an international or European court is called upon to consider the compatibility between the application of a domestic law and the solutions of international and European law. In this case, we are concerned with the issue of the operation of a national law in a context of international or European law. The judge is then led to examine the manner in which the national law disturbs the solutions established in the international or European legal order.

The area in which this circulation is undoubtedly most visible is that of economic rights. The international legal order has created a vast space of free trade endowed with its own rules and institutions (the WTO agreements and the dispute resolution body). The same is true a fortiori for the legal order of the European Union and its institutions (notably the Commission and the Court of Justice) which, for more than sixty years, have pushed the principle of integration towards the construction of a European internal market. These two legal spaces each function on their own level. It is possible to consider them in themselves, which is to say leaving aside the issue referred to above of their incorporation into national legal orders. This is not to say that national law does not have a

[32] M. Virally, "Sur un pont aux ânes: les rapports entre droit international et droits internes", in *Mélanges Rolin* (Pedone, Paris, 1964) 488; see more recently, arguing in favour of an implacably dualist conception of the French system, which is usually presented as monist: A. Pellet, "Vous avez dit "monisme"? Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française", in *L'architecture du droit, Mélanges en l'honneur de Michel Troper* (Economica, Paris, 2006) 827; M. Troper, *Le pouvoir constituant et le droit international*, Recueil des cours de l'Académie de droit constitutionnel (Paris, 2007, vol. XVI) 357) particularly given that it has been demonstrated that neither theory is capable of explaining all the relationships that exist between legal systems (D. Boden, *Le pluralisme juridique en droit international privé*, Arch. de Philo du droit (Dalloz, Paris, 2006, t. 49, Le pluralisme) 275.

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place within them. In effect, each time a national law establishes legal solutions that are potentially incompatible with the international or European levels, an international or European institution may be led to consider the impact of the application of a "foreign" law on its own level, in this case the national law of a Member State. In order to describe the process at work here, the concept of legal circulation is sometimes useful. The application of the national law is examined in light of the constructs of international and European law in order to determine whether it may be tolerated or, on the contrary, judged to be incompatible. The question may thus arise whether the application of the national law is a barrier to global or regional exchanges, incompatible with the rules of global commerce or the European internal market[33].

Another example exists: global circulation and contractual models inspired by the practice of international lawyers and their application in different national contexts. An international programme of research, led by Professor G. Cordero-Moss of the University of Oslo, undertook an analysis of the global circulation of model clauses drawn from the practice of international lawyers. The processes employed and, above all, the effects produced by the circulation of these models, notably when they are confronted by European or national courts, were reviewed. These reveal a great range of solutions, thus destabilising the myth that one contractual model, albeit dominant in the world of international business, can have exactly the same effects in different legal environments (notably in Common Law and Romano-Germanic systems)[34].

### (*ii*) Second scenario

The second scenario, more recently studied by lawyers, is that of circulation between the international and European levels. We have already remarked several times that the methods and solutions of international law are increasingly penetrating the European level of the application of law. The reverse is less common. Two major phenomena, already invoked and to which we will return, characterise the propensity of the methods and solutions of international law to circulate in the European context (European Union and Council of Europe). The first is the phenomenon of overlap between the different sources of law. The second relates to the case of the mimicry of the methods and solutions present.

These two phenomena interest us insofar as they illustrate well the concept of legal circulation. Overlapping implies, as we have seen, that a law formulated on one level is associated in its implementation with a law formulated at another level to produce a potentially different effect to that which pre-existed on each level. As for cases of mimicry, these reveal a very strong porosity between the different laws and, in particular, the aptitude for European law to be applied with reference to the tools and interpretations of international law by which it has largely been inspired. The relationship between the two legal systems is often complex, as European law willingly marks its independence

[33] See, for an in-depth study centred on this question of the application of national law in the international or European context: S. Bhuiyan, *National Law in WTO Law - Effectiveness and Good Governance in the World Trading System* (Cambridge University Press, 2007); L. Azoulai (ed.), *L'entrave dans le droit du marché intérieur*, (Bruylant, Belgique, 2011).

[34] For the published result of this research: G. Cordero-Moss (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law: Common Law Contract Models and Commercial Transactions Subject to Civilian Governing Laws* (Cambridge University Press, 2011).

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from international law. But the influence exerted by international law on European law is no less real, thus illustrating a form of circulation between normative spaces.

The activity of the two great European courts yields examples. Focusing only on decisions made between 2007 and 2009 by the two great European courts (CJEU and ECHR) [35], we observe that cases of the legal circulation of international law in the European law context proliferate[36].

The opposite scenario of the application of European law in the international context remains exceptional. International law resists the incorporation of European law, which is doubly marked by its regional and Western dimensions, into the general and global legal space it governs. But sometimes cases arise. We will give the example of legal circulation from the European level to the international level: the participation of the European Union in the work of the United Nations. The General Assembly of the United Nations adopted resolution 65/276 on the "Participation of the European Union in the work of the United Nations" on 10 May 2011. This resolution takes cognisance of the modifications brought by the Treaty of Lisbon of 13 December 2007 to the European treaties in force regarding, notably, the external representation of the European Union (Article 21 et seq. of the Treaty on European Union). Although we cannot speak of the "international transposition of a European provision", the idea that motivated the UN General Assembly was to allow for a certain implementation of the institutional modifications brought about at the European level in the international framework of the United Nations. The concept of circulation may again be mobilised to explain this type of intellectual approach. European law is foreign to United Nations law but this does not forbid the latter from considering the institutional presence of a European Union, which presents itself —which is to say circulates— in its international legal space.

Describing the circulation phenomenon has enabled us to distinguish between two different sub-categories: circulation on one level and inter-level circulation. Beyond this distinction, circulation reflects the general approach by which the lawyer seeks all pertinent legal resources in defining what one may call a "legal framework of reference". This search potentially reveals the existence of a constraint on circulation, particularly in the case in which a law may be enforced even though it may not be applied.

## THE ENFORCEABLE NON-APPLICABLE LAWS: CONSTRAINT ON CIRCULATION

The search for all relevant legal resources is rarely undertaken in a purely voluntary manner, free from legal constraints[37]. The lawyer, whether he is a judge or a barrister, for example, is not totally free to

[35] See, for example, *Chronique on the interactions of international and European law*, JDI 2009, at 903.

[36] For a comprehensive approach to the phenomenon, see notably: L. Burgorgue-Larsen, E. Dubout, A. Maitrot de la Motte and S. Touzé (eds.), *Les interactions normatives: droit de l'UE et droit international* (Pedone, Paris, 2012) ; M. Benlolo-Carabot, E. Cujo and U. Candas (eds.), *Union européenne et droit international* (Pedone, Paris, 2012) ; M. Delmas-Marty, Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World (Hart, Oxford, 2009), L. Gautron and L. Grard (eds.), Droit international et droit communautaire: perspectives actuelles: (Pedone, Paris, 2000) ; J. Wouters, A. Nollkaemper, E. de Wet (eds.), *The Europeanisation of International Law* (TMC Asser Press, Berlin, 2008).

[37] For a critical analysis of this type of method, see P. Brunet, L'articulation des normes – Analyse critique du pluralisme ordonné, in J.-B. Auby (ed), *L'influence du droit européen sur les catégories du droit public* (Paris, Dalloz 2010) 194.

do as he pleases in a globalised legal context. He is in effect subject to a number of constraints[38]. Among these constraints, the circulation of legal situations requires him to conduct a deliberately open search for the "legal framework of reference". Each time a lawyer situated in one context of application of the law knows that the situation he has to deal with has the potential to move to another context (either it has originated in another context, or has migrated to another context), he must take into account the law applying in these different legal environments. Notably, the definition of a legal framework of reference is part of this process.

In order to highlight this restraining relationship between the definition of the legal framework of reference and the circulation of legal situations, it is necessary to understand those, doubtlessly exceptional, situations in which a law that originated in one legal system may be invoked in another legal system even though it is not applicable there. This distortion between the applicability of a norm and its enforceability demonstrates that the legal circulation of a situation from one system to another may be experienced by the lawyer as a strong constraint that requires him to take into account the effects produced by a foreign national, international or European law which does not have any right to be applied in the receiving legal system.

### (1) National Level

This very peculiar form of legal circulation exists on the national level. It is thus that one may interpret, for example, the legal mechanism of recognition or the question of the effect produced by foreign mandatory laws.

The mechanism of the recognition of foreign judicial or extrajudicial public decisions and instruments, the extension of which to legal situations originating abroad is sometimes recommended, originates in a certain manner from a dissociation between the law that is applicable and the law that is enforceable. Assuming that it exists, recognition allows, in effect, the legal effects of a decision, a legal instrument or a situation to be invoked in State B, regardless of the law that was applied to it in State A. Now, it may be that the rules applied in State A are not those which would have been applied to decisions, legal instruments or situations of the same type in State B. For example, State B agrees to give legal effect to a divorce decision delivered in State A according to a law of that country that would not have applied in State B. In another example, State B agrees to give legal effect to the legal instrument establishing a body corporate registered in State A, even though the rules in force in State B do not allow the creation of a body corporate of this type. The interest of the mechanism of recognition is that it allows the legal effects produced by the application of a law in State A to be enforceable in State B, even though the law in question is not applicable in State B. This enforceability is not the result of a purely voluntary or whimsical process. It is made possible and binding because the law establishes a rule according to which the legal circulation of certain legal decisions and instruments must take place between State A and State B. This rule of circulation

[38] M. Troper, V. Champeil-Desplats, Ch. Grzegorczyk (eds.), *Théorie des contraintes juridiques* (Bruylant/LGDJ, Paris/Brussels), 2005.

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which applies incontestably in State B takes the form of a rule of recognition and allows the benefit of a law to be invoked in State B without the need for its applicability in that State to be verified.

A notable decision by the French Court of Cassation fuelled academic discussion on the possibility for a foreign mandatory law to be applied and enforced by a national court[39]. In this case, the question raised was whether the French court ought to take into account an embargo placed by Ghana on French beef when deciding on the validity of the transportation contract pertaining to merchandise of this type. The Court of Cassation struck down the decision of the appeal court which had decided "that the embargo decreed unilaterally by the State of Ghana on French beef was not binding (...), that in view of the applicable law the purpose of the transportation contracts did not fulfil any of the conditions established by Article 1133 of the French Civil Code and that it was therefore wrong for the sea transporter to maintain that, due to the embargo, the purpose of these contracts was illegal" ("*que l'embargo décrété unilatéralement par l'Etat du Ghana sur la viande bovine d'origine française n'a pas de force obligatoire (...), qu'au regard de la loi applicable la cause des contrats de transport ne remplit aucune des conditions énoncées par l'article 1133 du code civil français et qu'en conséquence c'est à tort que le transporteur maritime soutient qu'en raison de l'embargo, la cause de ces contrats n'est pas licite*") for the reason that it was for the Court of Appeal "to determine (...) the effect that could be given to the Ghanaian law invoked before it" ("*de déterminer (...) l'effet pouvant être donné à la loi ghanéenne invoquée devant elle*").

This reasoning is interesting, insofar as it leaves open the discussion on the manner in which a court should "give effect" to a foreign mandatory law. As one author notably commented[40], this expression refers potentially to two possibilities: that of the pure and simple "application" of the foreign mandatory law and that of the "taking into consideration" of the mandatory law at the time of the application of the French law governing the transportation contract. This taking into consideration of the foreign mandatory law illustrates the case of a norm which may be enforced in a contractual relationship without being applicable to that relationship. This enforceability without applicability was notably discussed on the occasion of the implementation of the European rules of international private law[41].

But this scenario is of most interest to us in the European and international context. One legal situation may use different vectors to circulate from one international or European system to another. Enforceability is one of the vectors allowing a law to be taken into account even though it is not applicable.

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[39] *Com., 16 mars 2010, pourvoi n° 08-21511*; on the decision delivered by the lower court after the case was referred back to it by the Court of Cassation, see Ph. Delebecque, Revue trimestrielle de droit commercial (Dalloz, France) 2012, 217.

[40] See, with the numerous references cited, the explanations of P. Deumier, *La loi de police étrangère: une possibilité que le juge a l'obligation d'envisager*, Revue de droit des contrats (Lextenso, France) 2010, 1385.

[41] Article 7§1 of Convention 80/934/CEE on the law applicable to contractual obligations of 19 June 1980 and, in a more restrictive formulation, Article 9§3 of Regulation (EC) n° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ 2008 L77/6); compare Article 17 of Regulation (EC) no 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, "Rome II" (OJ 2007 L199/40); Art. 10 of Regulation (EU) n° 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, "Rome III" (OJ 2010 L343/10).

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### (2) European Level

Let us consider, to begin, the European level, in which the phenomenon is the most developed. The European Convention for the Protection of Human Rights and Fundamental Freedoms, which occupies a prominent position in the current Treaty on European Union (Article 6 TEU), had long been totally absent from the provisions of the treaties relating to the different European Communities[42]. This did not prevent parties from invoking the Convention very early before the Court of Justice, which has considered, since 1976, that "international treaties for the protection of human rights, on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law"[43]. This "taking into account" of the ECHR despite the fact that it did not bind the European Communities in any sense was progressively reinforced from the moment that all the Member States were bound by this Convention[44]. The Convention became, with subsequent cases, an essential model for the human rights of the European Union[45].

This case law illustrates the increasing enforceability of the ECHR even though the Convention was not to become objectively applicable within the European Union until the day the latter effectively becomes party to the Convention[46]. Enforceability was used as a tool to allow the circulation of a legal situation internal to the legal order of the Community in national normative spaces (those of Member States) subject to a European convention which remains, for the time being, foreign to the system of the European Union. This circulation is very useful. It anticipates, as we shall see, another process of circulation: the impact of the decisions of the Court of Justice on national legal orders that wish to subject the European structure to a requirement for the protection of fundamental rights.

The case law of the Court of Justice of the European Union offers more recent illustrations in which international multilateral or bilateral instruments have been enforced by the Court despite the fact that they are not formally or materially binding on the European Union or, before its existence, on the European Communities. Different examples exist.

A first example, cited twice in this work, relates to the law of transportation. The Bogiatzi decision[47] illustrates, in effect, a case in which the Court of Justice considered that a Community regulation had to be applied in view of the provisions of an international convention which did not, however, form part of the legal order of the European Union. The Court therefore accepted that the international convention could be invoked before it with a view to producing legal effects even though the law itself was not objectively applicable. This distortion between the non-applicability of the Convention and its enforceability is evidence of the existence of a constraint that judges must take

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42 Before the Single European Act of 1986 (preamble) and above all, before the Treaty of Maastricht of 1992 (Article 6 TUE).

43 Case 4/73, Nold, [1974] ECR 491.

44 Case C-260/89, ERT, [1991] ECR 2925.

45 For example, Case C-23/93, TV10, [1994] ECR 4795

46 This signature of the Convention was provided for by the Treaty of Lisbon, which entered into force on 1 December 2009 and which is currently subject to negotiation.

47 Case C-301/08, Bogiatzi, [2009] ECR 10185.

into account. This constraint may be described in the following manner: the international convention forms part of the legal framework of reference of the transportation contract in question in the case, as the European regulation relied upon this legal framework in developing its own solutions, it must be applied in light of the international convention.

A second example concerns the law of social protection. In the important Gottardo decision[48], the Court of Justice had to consider the question of whether European law, notably the principle of equality (current Article 18 TFEU), authorised a French citizen to invoke the benefit of a bilateral agreement concluded between Switzerland and Italy, allowing the citizens of these two countries to cumulate the contributions paid to both countries in order to assert their right to a pension. Responding that "the competent social security authorities of one Member State [Italy] are required, pursuant to their Community obligations (...) to take account, for purposes of acquiring the right to old-age benefits, of periods of insurance completed in a non-member country [Switzerland] by a national of a second Member State [France] in circumstances where, under identical conditions of contribution, those competent authorities will take into account such periods where they have been completed by nationals of the first Member State pursuant to a bilateral international convention concluded between that Member State and the non-member country", the Court of Justice enforced a bilateral agreement between a Member State and a non-member State, even though there was no doubt that the convention was not applicable within the legal system of the European Union. This tandem of non-applicability/enforceability allows us to take into account here again the national and international legal framework of reference in which the preliminary reference submitted to the Court of Justice was situated, regardless of whether this framework extended beyond the borders of European law.

A third series of examples relates to the law of intellectual property which has been the subject of a large number of important international conventions, many of which do not bind the European Union, either because the European Union was not a party, or because the European Union is not considered to be the successor to its Member States in cases in which the latter are party to the instruments in question. Several decisions of the Court of Justice illustrate the ability of European law to take into account international legal instruments which form part of the legal framework of reference of the case[49]. We have a recent illustration in the neighbouring area of copyright[50] in which an Italian court consulted the Court of Justice on the difficulties of interpretation that arose in a case between a company responsible for collecting royalties on behalf of record producers and a dental practitioner who had refused to pay licence fees relating to the playing of ambient music in her dental practice. The case, which raised a question of principle relating to the identification of the holder of these rights similar to copyright and thus capable of falling under the law, involved the application of various legal texts. As in previous cases, it was for the Court of Justice to determine the "legal

[48] Case C-55/00, Gottardo, [2002] ECR 413.

[49] For a demonstration in this sense in industrial intellectual property law, see V. K. Ben Dahmen, *Interactions du droit international et du droit de l'Union européenne: expression d'un pluralisme juridique rénové en matière de protection de la propriété industrielle* (L'Harmattan, Paris, 2012).

[50] Case C-135/10, SCF, judgment of 15 March 2012, not yet published.

framework" of reference in which, in addition to relevant European law[51] and the national law applicable to the situation in question, figured different international legal texts relating to the protection of certain intellectual property rights. On this last aspect, which interests us here only in the interactions it has with European law, different questions were posed by the national court, notably: "'(1) Are the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961, the TRIPs Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights) and the WIPO Treaty on Performances and Phonograms (WPPT) directly applicable within the Community legal order? (2) Are the abovementioned sources of uniform international law also directly effective within the context of private-law relationships? (3) Do the concepts of 'communication to the public' contained in the abovementioned treaty-law texts mirror the Community concepts contained in Directives 92/100 and 2001/29 and, if not, which source should take precedence?" (judgment, para. 35). Responding to this series of questions, the Court of Justice decided that "the provisions of the TRIPS Agreement and the WPPT are applicable in the legal order of the European Union", that "as the Rome Convention does not form part of the legal order of the European Union it is not applicable there; however, it has indirect effects within the European Union; individuals may not rely directly either on that convention or on the TRIPS Agreement or the WPPT" and that "the concept of 'communication to the public' must be interpreted in the light of the equivalent concepts contained in the Rome Convention, the TRIPS Agreement and the WPPT and in such a way that it is compatible with those agreements, taking account of the context in which those concepts are found and the purpose of the relevant provisions of the agreements as regards intellectual property" (judgment, para. 56). In order to understand this reasoning and the recourse to the notion of "indirect effect", it is necessary to consider the international regulatory context in which the European secondary law in question was situated. The European Union and, before it, the European Communities, was not party to all the international legal instruments relating to intellectual property, notably including the Convention of Rome. The Member States of the European Union was not all party to the aforementioned instruments such that the substitution effect what CJEC applied to the GATT agreement in the famous International Fruit Company case[52], could not apply here. It results that certain international instruments of intellectual property law were not binding within the legal system of the European Union. Not being applicable, they should not, logically, have been enforceable. Now, the Court of Justice states in this case that, in spite of all, they produced an "indirect effect". In order to establish the nature of this effect, one may reason, as was recently proposed, in terms of opposability[53]. An international treaty that does not formally bind the European Union is part of a regulatory whole to

[51] Essentially Directive 2006/115/EC of the European Parliament and of the Council, of 12 December 2006, on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which amended and codified Directive 92/100 (OJ 2006 L 376/28) and, secondarily, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L167/10).

[52] Cases 21 to 24/72, International Fruit Company, [1972] ECR 1219,.

[53] K. Ben Dahmen, *Interactions du droit international et du droit de l'Union européenne: expression d'un pluralisme juridique rénové en matière de protection de la propriété industrielle* (L'Harmattan, Paris, 2012).

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which European secondary law voluntarily refers, such that it produces an effect of opposability within the European Union, notably where the interpretation of European secondary law in light of existing international treaties is in question. But one may equally propose to consider the question in terms of the dissociation between applicability and enforceability. This dissociation is justified by the fact that the situations presented in a preliminary reference are situated in a national regulatory context which is potentially different from that which exists at the European level. Insofar as these two contexts are compatible with each other, which is so in the case in question, because European law never intended to set aside the Rome Convention, but on the contrary, has never ceased to rely upon it, the Court of Justice has developed the clever strategy of interpreting European law in such a way as to fully take into account the regulatory context in which it will be implemented by national courts. But a related phenomenon may from now on be observed at the international level.

### (3) International level

We have already had the occasion to highlight the decision delivered by the International Court of Justice in the "Diallo" case[54]. We know that, in this case, the ICJ referred to a regional law: the African Charter on Human and Peoples' Rights of 27 June 1981 and, to a lesser extent, the European Convention for the protection of human rights and fundamental liberties of 1950 and the American Convention on Human Rights of 1969.

The enforceability of the African Charter on Human and Peoples' Rights of 27 June 1981 may be explained without great difficulty by the fact that it is applicable in the two countries party to the proceedings (in this case, the Republic of Guinea and the Democratic Republic of Congo). More surprising, in contrast, is the reference made immediately afterwards to the ECHR and to the American Convention and to the case law of the two regional courts: "The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights—the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 above" (§ 68 of the first judgment). This double reference may first be analysed as an operation of comparison. But one may nonetheless wonder whether, behind this comparison, the International Court of Justice did not wish to encourage the enforceability of regional norms in cases of this nature, insofar as strong circulation takes place between the case law of regional courts ruling in matters of human rights and that the ICJ did not wish the phenomenon to escape it. If such was its wish, we observe that circulation operates once more in these cases limited by a dissociation between applicability and enforceability.

[54] *Ahmadou Sadio Diallo case – Republic of Guinea v. the Democratic Republic of Congo* (2010), ICJ Reports (2010) 639; *Ahmadou Sadio Diallo case – Republic of Guinea v. the Democratic Republic of Congo, compensation*, ICJ Reports (2012) 324.

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## CONCLUSION

In a global context, lawyers have to learn to explore the mysteries of a plurality of laws, as several national, international and European laws applying to a given situation. Meanwhile, these laws may be implemented in several national, international and European contexts . In order to encompass and present the many ways in which the law operates, it is necessary to adopt a different perspective. Rather than considering this operation upstream, through the structure of the methods and solutions capable of grasping global legal pluralism, we must tackle, downstream of these methods and solutions, the resolution of the numerous difficulties with which the lawyer is confronted when he is called upon to apply the law.

This change of perspective has important implications. The methods and solutions applied at the national, international and European level are no longer understood separately. They are contemplated together, having regard to the effects they are likely to produce when they coexist on the occasion of the treatment of a situation.

The idea of circulation is a useful tool to develop a better understanding of situation in which national, international and European law all have to be applied in a combined manner. Circulation is not a legal concept or theory: it is a mere tool that enables lawyers to develop their intellectual understanding of the ever more frequent situation in which operating the law in a given context requires to take into account how law is or may be applied in another context.

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